

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Mary Elizabeth Blank,

Civil No. 02-4155 (DWF/SRN)

Plaintiff,

v.

**MEMORANDUM
OPINION AND ORDER**

Progress Casting Group, Inc., and
UNUM Life Insurance Company of
America,

Defendants.

Douglas A. Hedin, Esq., and Elizabeth Glidden, Esq., Hedin & Goldberg, 2100 Stevens Avenue South, Minneapolis, Minnesota 55404, on behalf of Plaintiff.

Joseph M. Sokolowski, Esq., and Anh T. Le, Esq., Parsinen, Kaplan, Rosberg & Gotlieb, 100 South 5th Street, Suite 1100, Minneapolis, Minnesota 55402-1298; and John Harper III, Esq., Krass Monroe, 1100 Southpoint Office Center, 1650 West 82nd Street, Bloomington, Minnesota 55431, on behalf of Defendants.

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on January 17, 2003, pursuant to Defendant Progress Casting Group, Inc.'s Motion to Dismiss for lack of subject matter jurisdiction. By its Complaint, Plaintiff alleges violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et. seq.* ("ERISA"), and further alleges state law claims of sexual harassment and reprisal under the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363.03. For the reasons outlined below, Defendant's motion to dismiss is denied.

Background

Plaintiff Mary Elizabeth Blank (“Blank”) was employed as a human resources manager at Progress Casting Group, Inc. (“PCG”), until late May 2001. During the time of Blank’s employment, PCG maintained a short-term disability plan, referred to as the Wage and Salary Continuation Practice, which provided up to 26 weeks of partial replacement income for a full-time employee who was disabled due to accident, hospitalization, surgery, or sickness.¹ The Wage and Salary Continuation Practice was managed by UNUM Life Insurance Company (“UNUM”). UNUM was responsible for reviewing and investigating claims, determining eligibility, and notifying the employee and employer of the status of the claim. Once UNUM approved a claim, the employee was to submit payment instructions to the PCG payroll department. After 26 weeks of coverage, the Wage and Salary Continuation Practice benefits potentially could convert to long-term disability benefits under a plan that undisputedly falls within ERISA coverage.

Under the Wage and Salary Continuation Practice, several factors determined the amount of benefits that an eligible employee could receive. First, the amount and duration of the pay replacement were based upon a graduated schedule that provided different benefit amounts depending upon an employee’s classification as salaried or hourly, exempt or non-exempt. Second, the benefits varied based upon the employee’s length of service. Finally, the employee’s available benefits varied based upon the length of their covered disability leave. For instance, while an employee could be eligible to receive full health care, life insurance, flex

¹ The Wage and Salary Continuation Practice is distinct from PCG’s Paid Time Off (“PTO”) Policy. Under the PTO Policy, salaried employees accrued leave that could be used for vacation, illness, medical appointments, and personal business.

credits, and long-term disability benefits for the first 12 weeks of coverage under the Wage and Salary Continuation Practice, after the first 12 weeks expired, the employee would lose all flex credits and become responsible for paying the full cost of all health care benefits.

While the factual details as to Blank's departure from PCG remain in dispute,² it appears that Blank filed an application for Wage and Salary Continuation benefits with UNUM dated May 31, 2001. On June 13, 2001, UNUM informed Blank that her claim had been approved. However, despite this approval, PCG refused to pay Blank benefits under the Wage and Salary Continuation Practice.

Blank commenced this action on October 24, 2002, seeking benefits under the Wage and Salary Continuation Practice, and alleging in part that PCG failed to meet its obligations under ERISA. PCG brought this motion to dismiss, raising the narrow issue of whether PCG's Wage and Salary Continuation Practice is a "plan" within the meaning of ERISA. PCG asserts that because the Wage and Salary Continuation Practice is not an ERISA plan, this Court does not have subject matter jurisdiction over Blank's claims. Because the Court cannot find conclusively that the Wage and Salary Continuation Practice is a plan that is exempt from ERISA coverage, PCG's motion to dismiss is denied.

² Blank alleges that she left PCG after she informed her supervisor that she was being sexually harassed by another PCG employee. Blank claims that she applied for benefits under the Wage and Salary Continuation Practice while she was still an employee of PCG. PCG, however, alleges that Blank voluntarily resigned from the company on May 25, 2001, and then, only after she had resigned, raised claims of sexual harassment. Thus, PCG does not concede that Blank was an employee of PCG at the time that she applied for benefits. These timing issues are not currently before the Court.

Discussion

1. Standard of Review

A motion to dismiss for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), may challenge the plaintiff's complaint either on its face or on the factual truthfulness of its averments. *See Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993); *Osborn v. U.S.*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). In a facial challenge to jurisdiction, the court restricts its review to the pleadings and affords the non-moving party the same protections that it would receive under a Rule 12(b)(6) motion to dismiss. *See Osborn*, 918 F.2d at 729 n.6. The court presumes that all of the factual allegations in the complaint concerning jurisdiction are true and will not dismiss the claims unless the plaintiff fails to allege an essential element for subject matter jurisdiction. *See Titus*, 4 F.3d at 593 (citing *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731-32 (11th Cir. 1982)); *Osborn*, 918 F.2d at 729 n.6.

In a factual challenge to jurisdiction, the court may consider matters outside the pleadings and the non-moving party does not benefit from the safeguards of 12(b)(6). *See Titus*, 4 F.3d 590 at 593; *Osborn*, 918 F.2d at 729 n.6. "In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Osborn*, 918 F.2d at 730.

"The existence of a plan is a prerequisite to jurisdiction under ERISA." *Harris v. Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986). PCG is making a factual challenge to this Court's jurisdiction as asserted by Plaintiff's Complaint. PCG argues that, on the facts of this case, the Wage and Salary Continuation Practice is a payroll practice that is exempt from

ERISA under 29 C.F.R. § 2510.3-1(b). Blank, in response, contends that the Wage and Salary Continuation Practice qualifies as an ERISA plan.

2. ERISA

Under ERISA, an “employee welfare benefit plan” is defined as

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment

29 U.S.C. § 1002(1). To qualify as a plan under ERISA, “a reasonable person must be able to ‘ascertain the intended benefits, a class of beneficiaries, source of financing, and procedures for receiving benefits’” (the “*Donovan* factors”). *Northwest Airlines, Inc. v. Federal Ins. Co.*, 32 F.3d 349, 354 (8th Cir. 1994), *quoting Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982). Some benefit programs, however, are exempted from ERISA coverage pursuant to Department of Labor regulations. Specifically, “employee welfare benefit plan” does not include

[p]ayment of an employee’s normal compensation out of the employer’s general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment)

29 C.F.R. § 2510.3-1(b)(2). PCG’s argument against subject matter jurisdiction hinges on this regulatory exemption.

PCG’s Wage and Salary Continuation Practice clearly meets the initial requirements of a plan under ERISA. PCG does not dispute that it meets all of the statutory qualifications, nor

does it dispute that it meets all of the *Donovan* factors. PCG asserts, however, that the plan is exempted from ERISA coverage by 29 U.S.C. § 2510.3-1(b)(2). The Court disagrees.

It is not clear to the Court that the Wage and Salary Continuation Practice fits within the regulatory exemption set forth in 29 C.F.R. § 2510.3-1(b)(2). There is no question that the Wage and Salary Continuation Practice benefits are paid from PCG's general assets and that the benefits are paid for periods of time during which the employee is unable to perform his or her duties. However, although the issue was not raised by the Plaintiff here, it is not obvious to the Court that the money paid to the employee during coverage under the Wage and Salary Continuation Practice constitutes "normal compensation" as contemplated by the regulation. According to the documents describing the Wage and Salary Continuation Practice, the Practice only covers the employee's health benefits for the first twelve weeks of coverage. At that point, the employee is solely responsible for paying all costs and submitting all payments in order to maintain health care benefits for the remainder of the employee's leave. While other courts have held that a reduction in salary is not sufficient to take a payroll practice out of the realm of "normal compensation" under 29 C.F.R. § 2510.3-1(b)(2) (*see, e.g., Hite v. Biomet, Inc.*, 38 F. Supp. 2d 720, 729 (N.D. Ind. 1999)), this Court is not convinced that a short-term disability practice that results in a complete cessation of some benefits can still constitute the payment of "normal compensation" under the regulation. Thus, the Court is not willing to accept PCG's assertion that the Wage and Salary Continuation Practice is an exempt payroll practice that is not covered by ERISA.

3. Supplemental Jurisdiction

Because the Court cannot determine conclusively that PCG's Wage and Salary Continuation Practice is a payroll practice that falls outside of ERISA coverage, and thus finds that subject matter jurisdiction is still appropriate on Blank's ERISA claims, the Court need not address PCG's contentions that the Court does not have supplemental jurisdiction over Blank's state law claims.

CONCLUSION

Based on the foregoing, and all of the files, records and proceedings herein, **IT IS ORDERED THAT:**

1. Defendant PCG's Motion to Dismiss (Doc. No. 5) is **DENIED**.

Dated: February 26, 2003

DONOVAN W. FRANK
Judge of United States District Court